Supreme Court, U.S.
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No. 01-1453

In the Supreme Court of the United States

J.B. MAYFIELD, *et al.*,
Appellants,
v.
STATE OF TEXAS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas, Tyler Division

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether Appellants may incorporate by reference arguments made by another party in a separately docketed, direct appeal.
2. Whether the arguments incorporated by Appellants should be dismissed because they attack a redistricting plan that is not properly before this Court.
3. Whether the judgment should be summarily affirmed because §2 of the Voting Rights Act does not require a state to draw "influence" districts.

LIST OF PARTIES

Although Appellants properly list Henry Cuellar, in his capacity as Texas Secretary of State, as a party to the action below, he is not a party to this appeal because the current Texas Secretary of State is Gwyn Shea.

Former Texas Secretary of State Cuellar was originally named in his official capacity as a defendant below, but he resigned from office in late 2001. Geoffrey S. Connor then served as Acting Secretary of State, and he automatically substituted for Secretary Cuellar in the proceeding below. FED. R. CIV. P. 25(d)(1). For this appeal, however, the current Secretary of State, Gwyn Shea, is automatically substituted, in her official capacity, in place of Acting Secretary Connor. SUP. CT. R. 35.3.

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MOTION TO DISMISS OR AFFIRM

Pursuant to Supreme Court Rule 18.6, the State of Texas, Texas Governor Rick Perry, and Texas Secretary of State Gwyn Shea (collectively "the State") move to dismiss this appeal because it attempts to incorporate by reference arguments raised by another party in a separately docketed, direct appeal that attack a plan not properly before this Court. Otherwise, Appellees ask that the Court affirm the judgment on the ground that the questions presented are so insubstantial as not to require further argument. SUP. CT. R. 18.6.

STATEMENT OF THE CASE

The State directs the Court to the statement of proceedings set forth in the three-judge court's opinion, which is a fair recitation of the proceedings leading up to this appeal. J.S. App., at 3-6.[1]

1. Appellants' jurisdictional statement will be cited as "J.S."

ARGUMENT

I. THE COURT SHOULD DISMISS THE PORTION OF THIS APPEAL THAT INCORPORATES ARGUMENTS BY REFERENCE.

A. Appellants Cannot Incorporate Arguments Made by Another Party in a Separately Docketed Direct Appeal.

Appellants attempt to "adopt and embrace" questions presented to this Court in a separately docketed direct appeal brought by the Mexican American Legislative Caucus—Texas House of Representatives ("MALC").[2] J.S., at i, 3, 6, 8-9. This incorporation by reference, however, presents nothing for the Court's review. While the Court's rules specifically allow two or more parties to jointly submit a jurisdictional statement, SUP. CT. R. 18.2, the rule also contemplates that any joint submission will be made in the same appeal: "Parties who file no document will not qualify for any relief from this Court." *Id.* The Mayfield Appellants neither filed a jurisdictional statement in MALC's appeal, nor did they join MALC's jurisdictional statement.

If the Mayfield Appellants desired to adopt the arguments presented by MALC, the proper method was to do so in MALC's appeal—not this one. And the Mayfield Appellants were fully able to do so, because the Texas House of Representatives plan is also at issue in MALC's appeal. *See* App., at 18-20. Appellants' attempt to incorporate issues and briefing from MALC's appeal is improper, and that portion of the appeal should be dismissed.[3]

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2. That appeal is styled *Mexican American Legislative Caucus-Texas House of Representatives v. Texas*, No. 01-1225.

3. In the event the Court determines that Appellants' incorporation is proper, the State also incorporates its Motion to Dismiss or Affirm filed in MALC's appeal, No. 01-1225, in response.

B. To the Extent that Appellants Incorporate MALC's Arguments, Those Arguments Attack a Plan That Is Not Properly Before This Court.

As previously discussed, Appellants purport to adopt the §2 challenges[4] made by MALC in its direct appeal. However, MALC's appeal (and Appellants' adopted arguments) attack the Texas House plan passed by the Legislative Redistricting Board ("LRB"),[5] not the plan adopted by the district court. These arguments, therefore, assail a plan that was never precleared, never became effective, and is not before this Court on appeal.[6]

As a matter of law, a legislative plan is not effective until it is precleared; therefore, any court ruling on a §2 challenge to an unprecleared plan would be advisory. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 542 (1978) ("A new reapportionment plan . . . will not be considered 'effective as law' . . . until it has been submitted and has received preclearance under §5. . . . [U]ntil clearance has been obtained, a court [should not] address the constitutionality of the new measure."); *Connor v. Waller*, 421 U.S. 656 (1975) (because an act is not effective until it is precleared, the district court erred in deciding constitutional challenges based on claims of racial discrimination).

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4. Appellants and MALC bring their challenges under §2 of the Voting Rights Act. *See* 42 U.S.C. §1973.

5. The LRB has a constitutional duty to reapportion seats in the Texas House of Representatives and Texas Senate, but not Congress, after a decennial census if the Texas Legislature fails to do so. TEX. CONST. art. III, §28. The LRB passed a plan for both the Texas House and Senate, which were sent to the Department of Justice for preclearance.

6. The State raised this argument in its Motion to Dismiss or Affirm filed in response to MALC's jurisdictional statement. *See* Mot., at 4-5 (No. 01-1225).

The three-judge court carefully structured Texas's redistricting litigation—which consisted of trials on each of the three redistricting plans drawn for the Texas Senate, the Texas House of Representatives, and Texas's Congressional districts—to avoid considering any unprecleared, and thus ineffective, plans. Accordingly, the court tried the cases in the order most likely to avoid consideration of a plan that, if subject to preclearance requirements, had not yet been reviewed by DOJ.

The three-judge court first tried the congressional case, since the Texas Legislature failed to pass a congressional plan and, therefore, there was no pending DOJ review.[7] The court next heard challenges to the LRB's Texas Senate plan, which had been precleared. This left only the Texas House plan, which was under review by the DOJ. Due to the time constraints of the 2002 elections, however, the three-judge court began the Texas House trial on November 12, 2001, even though DOJ had not yet ruled.[8]

Following the example of *Upham v. Seamon*, 456 U.S. 37, 38 (1982), and *Terrazas v. Clements*, 537 F.Supp. 514, 519 (N.D. Tex. 1982), the three-judge court heard evidence on the Texas House plan promulgated by the LRB, but it did not act until DOJ ruled.

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7. Initially, the three-judge court deferred federal proceedings until October 1, 2001, to give Texas's state courts an opportunity to address redistricting concerns. *See Growe v. Emison*, 507 U.S. 25 (1993). Once it became apparent that the state courts would be unable to timely complete this task, the three-judge court proceeded with the federal trials.

8. The House trial began three weeks before December 3, 2001—the first day for candidate filing for the 2002 elections. TEX. ELEC. CODE §172.023(b). Filing was scheduled to close on January 2, 2002, 51 days after the first day of trial. *Id.* §172.021(c). Optimally, a court would not hear evidence until after DOJ acted. Here, however, the imminence of the 2002 election process required the three-judge court to adopt this procedure if there was to be any possibility of deciding the case before the 2002 elections.

Because DOJ found that the LRB plan retrogressed in violation of §5, *see* App., at 25-32, the three-judge court fashioned its own plan to address DOJ's objections without unnecessarily disrupting the unobjected-to portions of that plan. *See Upham*, 456 U.S., at 41-43. Accordingly, the three-judge court remediated the deficiencies and rendered a map that violates neither §5 nor §2. App., at 1-11.

Consequently, it is the three-judge court's remedial plan—not the ineffective LRB plan—that determines Texas's House districts. The LRB map is not before this Court and any pronouncement on the ineffective LRB plan would be an impermissible advisory opinion.[9] Because Appellants' incorporated arguments challenge the LRB plan, these claims should be dismissed.

II. THE REMAINING QUESTIONS PRESENTED ARE NOT SUBSTANTIAL AND THE COURT SHOULD SUMMARILY AFFIRM.

The question of influence districts has been raised since the Court's decision in *Thornburg v. Gingles*, 478 U.S. 30, 46-47 & n.12 (1986). Beginning with *Gingles*, this Court has consistently declined to address whether influence-district claims are cognizable under §2. *See, e.g., Johnson v. De Grandy*, 512 U.S. 997, 1008-09 (1994) (assuming, without deciding, that *Gingles*'s first prong could be satisfied by a minority group that fails to comprise an absolute majority of the relevant population in additional districts) (citing similar approaches in *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993), *Growe v. Emison*, 507 U.S. 25, 41-42 & n.5 (1993), and *Gingles*, 478 U.S., at 46-47 & n.12).

Only two circuits have squarely addressed the issue and both rejected the existence of a §2 influence claim. *See Cousin v.*

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9. To the extent the arguments can be viewed as challenging the three-judge court's plan, the record, which was made before the §5 objection caused the district court to draw its own plan, does not directly address that plan.

Sundquist, 145 F.3d 818, 828-29 (CA6 1998), *cert. denied*, 525 U.S. 1138 (1999); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (CA7 1988). Additionally, the Fifth Circuit has implicitly rejected the influence-claim concept. *See Valdespino v. Alamo Heights Indep. Sch. Dist.*, 108 F.3d 848, 852-53 (CA5 1999) (noting that this Court has always required "vote dilution claimants to prove that their minority group exceeds 50% of the relevant population in the demonstration district," with the "relevant" population being determined by "voting-age and citizenship"), *cert. denied*, 528 U.S. 1114 (2000).

Appellants incorrectly suggest that influence-district claims have been upheld by two circuits. In neither of these cases, however, did the court consider the validity of an influence claim or did the party seeking relief actually prevail on an influence claim. Instead, in *Uno v. City of Holyoke*, the circuit court remanded the case on different grounds, and noted that the district court should also consider the validity of the influence claim on remand. 72 F.3d 973, 990-91 (CA1 1995). And, in *Garza v. County of Los Angeles*, the Ninth Circuit rejected the county redistricting board's map for two reasons, neither of which was based on the recognition of a pure influence claim.[10] 918 F.2d 763, 776 (CA9 1990), *cert. denied*, 498 U.S. 1028 (1991).

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10. The *Garza* court first held that the board's plan was not entitled to deference because it had not passed with the requisite number of votes required to validate the plan. *Garza*, 918 F.2d, at 776. Second, the court held that there was no good faith effort to comply with §2 because the board had used "unnatural configurations" to place an Anglo incumbent in a Hispanic district and had fragmented some Hispanic communities "in the same manner in which the Board had deliberately diluted Hispanic influence in the past." *Id.* The court did not hold that the appellants had made out a valid influence claim, and in fact pondered, without deciding, whether such a claim could actually exist under *Gingles*. *Id.*, at 770 n.2.

Nor does *Armour v. Ohio,* 775 F.Supp. 1044 (N.D. Ohio 1991), support Appellants. Although the district court in *Armour* determined that an influence claim was viable, that holding does not survive the Sixth Circuit's subsequent decision in *Cousin v. Sundquist*, which squarely rejected the validity of influence-district claims. 145 F.3d, at 828-29 (citing *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947-48 (CA7 1988)). Therefore, *Armour*'s contrary holding has been abrogated.

In short, the concept of influence districts has been around for more than sixteen years, and the circuit courts have uniformly rejected those claims. Because the lower courts are resolving the issue in a consistent fashion, there is no conflict or uncertainty warranting this Court's intervention, and, accordingly, the question is not substantial.

Indeed, moving from the *Gingles* clearly delineated 50% threshold toward an "influence" standard would inevitably push courts away from judicially manageable criteria and toward the political thicket. *See, e.g., Gaffney v. Cummings,* 412 U.S. 735, 749-50 (1973) (warning courts of the hazards of the "political thicket" when adjudicating reapportionment cases). "Influence" is a particularly amorphous concept, as virtually any level of concentration of a racial or ethnic group can amount to some level of influence. How is a court to determine when that level is sufficiently high to be judicially cognizable? If the Court is to address the question of influence districts, it should to do so only after the conflicts have actually developed below which present the Court with concrete "influence" issues to review.

Accordingly, the judgment should be summarily affirmed.

CONCLUSION

The Court should dismiss the portions of the appeal that either attempt to incorporate arguments by reference or that present issues that are not properly before this Court. Otherwise, Appellees ask the Court to summarily affirm the judgment of the three-judge court. SUP. CT. R. 18.12.

Respectfully submitted,

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